88-1384

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TELUM, INC., EARL K. COOK and CARL R. KING,
Petitioners,

v.

E.F. HUTTON CREDIT CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should resolve the uncertainty that has existed for over two decades among the courts of appeals over the extent to which the Rules of Decision Act reaches jury trial issues in diversity cases.

2. Whether the court of appeals erred in holding that the effect of fraud in the inducement of a contract on the enforceability of a "jury waiver" provision in a contract between private parties is governed by federal, and not state, law.

LIST OF PARTIES

All parties to the case are listed in the caption. Petitioner, Telum, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1 of the Rules of this Court.

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TELUM, INC., EARL K. COOK and CARL R. KING,
Petitioners,

v.

E.F. HUTTON CREDIT CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Telum, Inc., Earl K. Cook and Carl R. King hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on October 14, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1a-10a) is reported at 859 F.2d 835.

The district court did not issue a memorandum opinion or findings of fact and conclusions of law, but entered judgment (App., *infra*, 13a-15a) based upon a jury verdict. The judgment has not been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1988. A petition for rehearing was denied (App., *infra*, 11a-12a) on November 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Telum, Inc. is a Nebraska corporation that owns various truck stops in the mid-western and western parts of the United States. Petitioners Cook and King are the founders and owners of the corporation. Respondent E.F. Hutton Credit Corporation ("Hutton") was engaged in the business of purchasing and leasing equipment and of providing equipment loans to its customers. App., *infra*, 2a. During the time relevant to this lawsuit, Hutton's Salt Lake City, Utah office primarily provided equipment leases which enabled customers to obtain an optional investment tax credit. Telum was one of Hutton's customers.

On July 20, 1980, Hutton purchased an oil rig from J.P. Exploration, Inc., which Hutton then leased to petitioner Telum, Inc. In turn, Telum sublet the rig to J.P. Exploration, thereby permitting Telum to take a lawful investment tax credit. The lease between Hutton and Telum was personally guaranteed on Telum's behalf by petitioners Cook and King. *Ibid.*

The lease arrangements operated smoothly until J.P. Exploration was sold to a third party, which discontinued payments. Telum then attempted to repossess the rig and discovered for the first time in January 1983 that there was no rig as described by Hutton itself in the schedule attached to the lease agreement between Telum and Hutton. *Ibid.*

Petitioners filed this suit in the United States District Court for the District of Utah, alleging fraud in the

inducement of the lease with Hutton, and seeking 1) to rescind petitioners' obligations under the lease, 2) to obtain restitution for lease payments made by Telum and 3) to recover the actual expenses incurred in repossessing the rig. Hutton counterclaimed, seeking to enforce Telum's lease obligations. App., *infra*, 2a-3a.

Petitioners requested a jury trial. Hutton opposed the request, relying upon a clause in the lease agreement which contained a "jury waiver" in the event of a dispute over the lease. The lease provided that Telum "waives all right to trial by jury in any litigation arising herefrom or in relation hereto." App., *infra*, 4a. The lease also provided that its interpretation would be governed by New York law. Under both New York and Utah law (which New York might use under its conflicts of law standards), it is settled that a jury waiver provision, like every other provision, contained in a fraudulently induced contract is not binding on the defrauded party. See *Kountze* v. *Kennedy*, 147 N.Y. 124, 41 N.E. 414 (1895); *Seneca Wire & Mfg. Co.* v. *Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928); *President and Directors of Manhattan Co.* v. *Monogram Associates, Inc.*, 92 N.Y.2d 579, 580 (N.Y. 1949); *Ogden Valley Trout & Resort Co.* v. *Lewis*, 41 Utah 183, 125 P. 687, 692 (1912) ("Why should he who makes false representations be permitted to profit by them . . .?"); *Frailey* v. *McGarry*, 116 Utah 504, 211 P.2d 840 (1949). See generally 12 *Williston on Contracts* § 1500 (3rd ed. 1970).

Because of the dispute between the parties over whether a jury trial should be permitted, the district court faced a preliminary procedural problem. If there was no fraud in the inducement of the lease agreement, then under the terms of the contract, petitioners were not entitled to a jury on any issues. If, however, there was fraud, then petitioners' rights were unaffected by the "jury waiver" provision in the lease, and a jury in the case would be appropriate. To avoid permitting petition-

ers to defeat the jury waiver provision by a simple allegation of fraud, the district court required petitioners to put on the record their proof of fraud before the court, sitting without a jury. After this preliminary offer of proof, the district court held that there was sufficient evidence of fraud to permit the court provisionally to set aside the jury waiver provision pursuant to state law and allow the jury to determine if there had been a fraud committed.

The case was then tried to a jury. The jury returned answers to special interrogatories and found, *inter alia*, that Telum was induced by Hutton's fraud to enter into the contract. Based upon this verdict, the district court rescinded the contract and dismissed Hutton's counterclaim. App., *infra*, 3a. The district court also granted Telum restitution for monies spent to reacquire some components of the oil rig.

The court of appeals set aside the judgment. App., *infra*, 1a-10a. On the pivotal question of whether the appropriate rule of decision should be one of federal or state law, the court of appeals held that "[t]he right to a jury trial in the federal courts is governed by federal law." App., *infra*, 4a. Accordingly, the court held that the issue of whether there was a waiver of the jury trial right also should be controlled by federal law. The court of appeals, however, found no federal cases involving facts similar to those here and therefore the court relied "by analogy" upon "the federal cases dealing with the effect of fraud in the inducement upon the enforceability of contract arbitration clauses." App., *infra*, 5a.

Based on this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967), that allegations of fraud in the inducement are not sufficient under Section 4 of the United States Arbitration Act, 9 U.S.C. § 4, to justify setting aside an arbitration clause, the court of appeals held that a fraud which in-

duces a party to enter into any other type of contract does not as a matter of federal common law void a jury trial waiver provision. Instead, petitioners were required to prove that they were defrauded specifically into giving up their right to a jury trial. App., *infra*, 5a-6a. Because petitioners had made no such showing, the court of appeals vacated the judgment and remanded for a new trial without a jury.[1] *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision of the Tenth Circuit, overturning a jury verdict and denying petitioners a jury trial that clearly would have been available to them under state law, raises a fundamental and recurring issue concerning the proper interpretation of the Rules of Decision Act, 28 U.S.C. § 1652. The court's reasoning and result implicate two significant problems with which the lower federal courts have struggled in interpreting the Rules of Decision Act since this Court's decision in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). First, the Tenth Circuit incorrectly relied upon the presence of a jury trial issue as a basis for choosing a "federal" rule of decision, even though the Seventh Amendment was completely irrelevant to the proper resolution of the issue. Thus, the holding below directly raises the question of the relationship between this Court's decisions in *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), which dealt specifically with jury trial issues in federal courts, and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), which appeared to lay down more general, and somewhat inconsistent, standards for applying the Rules of Decision Act. The relationship

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[1] Because the case was being remanded for a new trial, the court of appeals also disposed of several additional issues raised by both petitioners and respondent. In so holding, however, the court made clear that it was the jury trial issue that had "dispositive effect." App., *infra*, 4a.

between these two cases has confused the lower courts and permitted inconsistent results for at least two decades.

Second, the court of appeals ignored state contract law as the proper rule of decision solely because the contract provision concerned a matter of procedure. The validity of that approach under the Rules of Decision Act was before the Court last Term in *Stewart Organization, Inc.* v. *Ricoh Corp.*, 108 S.Ct. 2239 (1988), but the issue was not resolved there because the Court held that the Rules of Decision Act did not apply. This case presents the Court with a suitable vehicle through which to resolve that precise question, which is a matter of substantial practical importance as contractual provisions governing dispute resolution are becoming more popular. Accordingly, the Court should grant the petition to resolve the problem that the Court intended to reach, but did not in *Stewart Organization, Inc.*

1. In *Hanna* v. *Plumer*, *supra*, this Court made clear that the choice of law issues which arise under the *Erie* doctrine involve three separate legal issues. The first involves the constitutional limits on Congress' power to prescribe statutory law for suits brought in federal courts under diversity of citizenship; the second involves the statutory limits provided by the Rules of Decision Act on the power of federal courts to employ wholly judge-made rules in diversity suits to the exclusion of applicable state law; and the third involves the statutory limits specified by Congress in the Rules Enabling Act, 28 U.S.C. 2072, on this Court's power to prescribe non-statutory rules for federal courts.

This case clearly falls within the second category of *Erie* problems which requires the Court to apply the Rules of Decision Act. There is no federal statute or rule of procedure that supplies any rule of decision either with respect to how to interpret a contract that waives a jury or what effect fraud has on the validity of that

waiver and so state law should have been applied. Nevertheless, the court of appeals ignored state law because "[t]he right to a jury trial in the federal courts is governed by federal law." App., *infra*, 4a.

But the issue before the Court—the effect of fraud on a contractual jury waiver provision—in no way implicates anything in the Seventh Amendment. Indeed, if the Seventh Amendment had any relevance to this case, it would tend to favor the availability of a jury trial. See *Simler* v. *Conner*, 372 U.S. 221, 222 (1963) ("The federal policy favoring jury trials is of historic and continuing strength"); *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937) (courts should indulge every reasonable presumption against waiver of jury trial). The Seventh Amendment certainly provides no federal law basis for undermining New York and Utah's public policies, embodied in their common law, of deterring fraudulent conduct by depriving the wrongdoer entirely of the benefits of any tainted bargain. See 12 *Williston on Contracts* § 1500, p. 401 (3rd ed. 1970) ("it would be unjust and inequitable to permit a person who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations").

The court of appeals created a federal rule based on analogy to federal cases dealing with the effect of fraud in the inducement upon the enforceability of a contract arbitration clause governed by Section 4 of the United States Arbitration Act. But the court acknowledged that the Arbitration Act has no applicability to this case. Because there was no federal law basis for its holding, the court of appeals should have followed the mandate of the Rules of Decision Act and looked to state law. See 28 U.S.C. § 1652 ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States . . ."). Instead, the court of appeals has reached a result that conflicts directly with this Court's holding in *Texas Industries, Inc. v. Rad-*

cliff Materials, Inc., 451 U.S. 630, 640-641 (1981), where the Court held that "the vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Article I mean that federal courts are free to develop a common law to govern those areas until Congress acts."

The error committed by the Tenth Circuit raises a more fundamental problem with the *Erie* line of cases, *viz.*, what is the relationship between this Court's analysis in *Byrd* v. *Blue Ridge Rural Elec. Coop, supra* and its reasoning in *Hanna* v. *Plumer, supra.* In *Byrd*, this Court focused its analysis on the relationship between the federal and state systems of doing justice. Within that framework, the Court applied federal law on the issue of whether a particular factual matter had to be decided by a judge or a jury because the state had very little interest in what procedure was used, but the federal court had a substantial interest as "an independent system for administering justice to litigants who properly invoke its jurisdiction." 356 U.S. at 537. Because of the federal court's strong preference for trial by jury, the Court applied a balancing test in deciding that federal law should apply.

In *Hanna*, by contrast, the Court held that the basic focus of the Rules of Decision Act must be on the interests of the litigants. Thus, in deciding whether state law should be selected as the rule of decision in a diversity case, the Court held that the analysis must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468. In setting out this general approach, the Court failed to indicate precisely what was left of the system-oriented balancing approach set out in *Byrd.*

The courts of appeals have made clear that there is no obvious way to reconcile those two opinions. See

e.g., *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc) (*Byrd* is inconsistent with "later authority"); *Feinstein* v. *Massachusetts General Hospital*, 643 F.2d 880, 886 n.8 (1st Cir. 1981) (identifying scholarly analysis of tension between *Byrd* and *Hanna*); *Edelson* v. *Soricelli*, 610 F.2d 131, 140 (3d Cir. 1979). See also *Rovegno* v. *Geppert Bros.*, 677 F.2d 327, 338 (3d Cir. 1982) (Van Dusen, J., dissenting) (noting the need to "reconcil[e]" *Byrd* and *Hanna*). Moreover, the legal commentary generally has noted the inconsistency between the approaches taken in the two cases. See Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974); Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356 (1977).

The Tenth Circuit in this case interpreted *Byrd* and *Simler* v. *Conner*, *supra*, as establishing an enclave of federal common law in diversity cases for issues involving the relation between the judge and jury.[2] In so doing the decision below plainly conflicts with *Hanna*; indeed, the court of appeals completely ignored *Hanna*. There can be no serious question that the legal effect of fraud in the inducement of a contract on the availability of a jury trial involves a matter that would affect a reasonable litigant's choice of forum at the outset of litigation. Moreover, depriving petitioners of a jury trial in this case in federal court, when they clearly would have

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[2] A similar approach has been followed by other courts of appeals. *See, e.g., Wilson* v. *Nooter Corp.*, 475 F.2d 497, 503-504 (1st Cir.), *cert. denied*, 414 U.S. 865 (1973) (federal law applies to size of jury); *Karlson* v. *305 East 43rd St. Corp.*, 370 F.2d 467, 472 n.1 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967) (remittitur). By contrast, still other courts have applied the general approach in *Hanna* to such issues in order to promote fair treatment of litigants and to discourage forum shopping. *See DiAntonio* v. *Northampton-Accomack Memorial Hospital*, 628 F.2d 287, 290-291 (4th Cir. 1980) (*Byrd* does not control what evidence must be presented to the jury).

been given one in state court, is manifestly unfair. It is plain that the protections the law affords victims of fraud should not depend upon whether or not the defendant lives in the plaintiff's state of residence. "Certainly, the *Erie* doctrine has previously been held to require the application of state law on subjects of similar or obviously lesser importance." *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2249 (1988) (Scalia, J., dissenting), citing, *Walker* v. *Armco Steel Corp.*, 446 U.S. 740 (1980); *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198 (1956); *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949).

2. Last Term, the Court granted certiorari to determine whether "federal law, rather than state law, governs the enforceability of a forum-selection clause in a contract between two private parties, even though the forum state . . . has a strong public policy against the enforcement of such contractual provisions." Petition for Certiorari at 5, *Stewart Organization, Inc.* v. *Ricoh Corp.*, No. 86-1908. The petitioner in that case specifically posed the question as one arising under the Rules of Decision Act.

This Court in *Stewart Organization, Inc.*, however, held that 28 U.S.C. § 1404 controlled the choice of forum issue and therefore the Court was not required to interpret the Rules of Decision Act as it applies to a contract provision regulating a judicial procedure to be employed in a federal court. The issue of whether state law contract principles can be ignored by a federal court if the provision at issue affects a federal court procedure warrants review by this Court just as much today as it did when the Court granted certiorari in *Stewart*. Under *Erie* it would appear clear that a federal court does not have the authority or power to develop federal common law when faced with issues involving "purely commercial law" and "obligations under contracts entered into and to be performed within the State." 304 U.S. at 75.

The holding below that the federal court was free to ignore state law governing the Telum-Hutton contract gives rise to the same conflict in the circuits that warranted review in *Stewart Organization, Inc.* v. *Ricoh Corp., supra.* The court here, just like the court of appeals in *Stewart,* refused to be bound by state law in deciding whether the procedural requirement in the contract should be enforced in a federal court. That result conflicts squarely with the analysis of the Third Circuit in *General Engineering Corp.* v. *Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-357 (1986), which held that state law controlled such contracts for the following reasons:

> The construction of contracts is usually a matter of state, not federal, common law . . . . Only rarely will federal common law displace state law in a suit between private parties . . . . *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), teaches that federal jurisdiction alone does not create a sufficiently strong federal policy to deny the application of state law.

Accordingly, the court held that the procedural requirement in the parties' contract had to be enforced in accordance with the state's common law rule. See *Colonial Leasing Co., Inc.* v. *Pugh Brothers Garage,* 735 F.2d 380 (9th Cir. 1984) (applying state law to enforce forum-selection clause).[3]

Moreover, the decision whether contract provisions purporting to regulate the adjudicatory process (in the event there is a dispute between the parties) should be

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[3] While the specific holdings in the cases cited in the text do not survive this Court's holding in *Stewart Organization, Inc.*, because of this Court's interpretation of 28 U.S.C. § 1404, their analysis of the Rules of Decision Act remains fundamentally sound as demonstrated by Justice Scalia's dissenting opinion in *Stewart.* 108 S. Ct. at 2245-49 (Scalia, J.) Thus, the basic reasoning in those decisions is absolutely irreconcilable with the result of the Tenth Circuit in this case.

interpreted according to state law is an important practical issue because contracting entities are attempting with increasing frequency to regulate the dispute resolution process by agreement. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 536 (1986) (noting the recent increase in "frequency" of efforts to modify judicial process consensually).[4] If the federal court's interest as an independent entity permits a federal court to ignore the parties' contracts as interpreted under state law, that result will unquestionably "regulate primary conduct" in a way that should be clarified by the Court immediately. *Hanna* v. *Plumer*, 380 U.S. at 476 (Harlan, J., concurring).

The holding of the Tenth Circuit also has dealt a strong blow to the basic federalism principles underlying *Erie*. "Our federalism" reserves to each state many powers; preeminent among them is the authority to safeguard the welfare of its citizens. Utah and New York have expressed a strong public policy against permitting a party who fraudulently induces a contract to benefit from the bargain. See p. 3, *supra*. It may be, as the Tenth Circuit held, that a different policy would be followed if this case were subject to the United States Arbitration Act, but it is not. And it is not within the authority of a federal court to decide for itself that a jury waiver provision is too important to be nullified because of a generalized fraud affecting the contract. The contrary policy judgment was made by the states whose law should be applied here and whose judgments should have been respected.

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[4] *See generally*, Nelson, *The Immediate Future of Alternative Dispute Resolution*, 14 Pepperdine L. Rev. 777 (1987); Petillon, *Recent Developments in Alternative Dispute Resolution*, 14 Pepperdine L. Rev. 929, 929 (1987) (ADRs "have gathered substantial momentum over the past several years"); Lambros, *The Alternative Movement: Rekindling America's Creative Spirit*, 1 Ohio State J. on Dispute Resolution, 3, 5 (1987).

As Justice Harlan declared, *Erie* is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna* at 474 (concurring opinion). Because the holding below works a serious reallocation of that authority, the decision to deny petitioners a jury trial in this case warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 86-1375, 86-1496

TELUM, INC., a Nebraska Corporation,
EARL K. COOK and CARL R. KING,
Plaintiffs-Appellees and Cross-Appellants,

v.

E.F. HUTTON CREDIT CORPORATION, a corporation,
Defendant-Appellant and Cross-Appellee.

Oct. 14, 1988

Rex E. Madsen (Reed L. Martineau, Michael C. Carlston and Stephen J. Hill, with him on the brief), Snow, Christensen & Martineau, Salt Lake City, Utah, for plaintiffs-appellees.

Francis M. Wikstrom (T. Patrick Casey, with him on the brief), Parsons, Behle & Latimer, Salt Lake City, Utah, for defendant-appellant.

Before MOORE and BALDOCK, Circuit Judges, and BOHANON, District Judge*.

BALDOCK, Circuit Judge.

This is an appeal from a final judgment in favor of plaintiff-appellee Telum, Inc. (Telum) and from an order denying the motion by defendant-appellant E.F. Hutton

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* The Honorable Luther L. Bohanon, United States District Judge for the Western District of Oklahoma, sitting by designation.

Credit Corp. (Hutton) for a new trial or a judgment notwithstanding the verdict. Telum brought an action to rescind both the lease of an oil drilling rig and the personal guaranties of Telum's owners, Carl King and Earl Cook, with Hutton on the grounds of fraud, breach of contract, failure of consideration, negligent misrepresentation, mutual mistake, unilateral mistake and constructive fraud. Telum also sought special damages on the fraud claim. Hutton counterclaimed to enforce the lease and guaranties.

I.

The parties to this dispute entered an agreement whereby Hutton would purchase from J.P. Exploration, Inc., represented by Robert Pinder, an oil rig which would then be leased to Telum. Telum would then take the appropriate investment tax credit and sublease the rig back to J.P. Exploration. The parties signed the relevant agreements in July 1980, and Telum and J.P. Exploration began making their respective lease and sublease payments.

These payments continued for approximately two years until J.P. Exploration was sold to a third party who discontinued the sublease payments. Telum then sought to repossess the rig and, in the meantime, signed an extension agreement with Hutton which deferred Telum's monthly lease payments for a period of three months. Thereafter, in January 1983, Telum claims it discovered for the first time that the rig was not complete as described in a schedule attached to the lease at the time of the July 1980, closing. Thereupon, Telum sued to rescind the lease and recover restitution consisting of lease payments made and special damages for expenses incurred in retrieving the rig after the sale of J.P. Exploration.

At trial, Telum sought rescission, contending that Ray Welling, an employee of Hutton, made a number of misrepresentations which wrongfully induced Telum to enter

the lease. Hutton counterclaimed to enforce the lease, arguing that Telum's reliance upon Welling was unreasonable. Hutton also claimed that Telum knew of the discrepancies between the lease equipment schedule and the actual rig at the time the extension agreement was signed, thereby waiving any claim for fraudulent inducement. Hutton further asserted that the facts showed the existence of a joint venture between Telum and Pinder. According to Hutton, if there were a joint venture, Pinder's knowledge that the rig was incomplete could be attributed to Telum.

The issues were tried before a jury which answered special interrogatories, finding that (1) Hutton had not proved by a preponderance of the evidence that Telum, Cook and King, at the time that Telum signed the extension agreement, knew about the fraud, and that (2) Telum, Cook and King proved with clear and convincing evidence that they were induced by Hutton's misrepresentations of material fact to enter the lease agreement. Based upon the jury verdict, the trial court entered judgment rescinding the lease and the personal guaranties and dismissed Hutton's counterclaim. The court also denied Hutton's motion for a new trial or judgment notwithstanding the verdict.

Hutton appeals on four grounds. First, it claims that Telum did not prove by clear and convincing evidence that its reliance on Hutton was justifiable and reasonable. Second, Hutton maintains that the undisputed evidence at trial was that Telum expressly waived its claim for fraudulent inducement by signing the extension agreement with knowledge that the rig was incomplete. Third, Hutton alleges that the district court erred by not allowing the jury to determine whether Telum and Pinder had formed a joint venture. Finally, Hutton argues that the trial court erred in failing to enforce a jury waiver provision of the contract.

On cross-appeal, Telum urges that the trial court erred by denying its request for special damages. Second, Telum alleges error in the court's failure to present its alternative theories to the jury, including negligent misrepresentation, failure of consideration, mutual mistake and unilateral mistake. Finally, Telum claims that the trial court wrongly excluded evidence purporting to show that Welling had embezzled $40,000 from Hutton in connection with the Telum lease. Because of its dispositive effect, we will deal with the jury-waiver issue. We reverse and remand.

II.

After Hutton counterclaimed, Telum demanded a jury trial. Hutton opposed this demand, relying on ¶ 16(b) of the master lease agreement between the parties which provided in part that the "[l]essee waives all right to trial by jury in any litigation arising herefrom or in relation hereto." Exhibit 1. The trial court granted Telum's request for a jury trial, rec. vol. IV at 26, and denied Hutton's motion to reconsider that ruling, rec. vol. XII at 9. In answers to special interrogatories, the jury found that Telum, without knowledge of the relevant facts, was induced to enter the lease agreement as a result of Hutton's material misrepresentations. Upon the jury's finding of fact, the trial court entered judgment in favor of Telum, dismissing Hutton's counterclaim, ordering rescission of the lease agreement and awarding Telum restitution with interest and costs.

On appeal, Hutton argues that the trial court erred in failing to enforce the jury waiver provision of the contract without proof that the waiver provision was itself fraudulently induced. We agree.

The right to a jury trial in the federal courts is governed by federal law. *Simler v. Conner*, 372 U.S. 221, 221-22, 83 S.Ct. 609, 609-10, 9 L.Ed.2d 691 (1963) (per curiam) (jury trial right controlled by federal law to

insure uniformity in exercise required by seventh amendment). Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy. *McCarthy v. Wynne*, 126 F.2d 620, 623 (10th Cir.), *cert. denied*, 317 U.S. 640, 63 S.Ct. 31, 87 L.Ed. 515 (1942); *see Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir.1986) (right to jury trial, although fundamental, may be knowingly and intentionally waived by contract); *K.M.C. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir.1985) (considering it "clear that the parties to a contract made by prior written agreement waive the right to jury trial").

Appellees acknowledge the possibility of waiver but rely on several cases where courts have refused to uphold contractual jury waiver provisions. *See National Equip. Rental v. Hendrix*, 565 F.2d 255 (2d Cir.1977); *Dreiling v. Peugeot Motors of America*, 539 F.Supp. 402 (D.Colo. 1982). These decisions relied on facts such as inconspicuous fine print or a gross disparity in bargaining power to invalidate jury waiver provisions. Telum and Hutton, on the other hand, were both sophisticated parties, and the provision here was in the normal print size of the contract. Moreover, the trial judge did not invalidate the waiver based on such findings, but rather seemed to conclude that Telum's allegations of fraud in the inducement relating to the contract as a whole were sufficient to vitiate the provision. Rec. vol. IV at 16-17; *id.* vol. XII at 8-9.

The parties have not cited any federal cases dealing specifically with this issue, and we have found none. Appellants urge us to accept by analogy the federal cases dealing with the effect of fraud in the inducement upon the enforceability of contract arbitration clauses. Both the United States Supreme Court and this court have held that allegations of fraud in the inducement relating specifically to an arbitration provision may suspend application of such a provision. Allegations of fraud in

the inducement going to the contract generally, however, have been held not to affect the agreement to arbitrate.[1] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 1805-06, 18 L.Ed.2d 1270 (1967); *Meyer v. Dans un Jardin, S.A.*, 816 F.2d 533, 538 (10th Cir.1987). This analogy is especially appropriate here because submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury. *See Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) ("[a]rbitration differs radically from litigation, and one who chooses it must be content with its informalities and looser approximations").[2] For these reasons, we hold that the trial judge erred in ruling that general allegations of fraud are sufficient to invalidate a jury waiver provision. Appellees were not entitled to a jury trial as a matter of law. Accordingly, we vacate the judgment entered by the trial court and remand for a new trial without a jury.

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[1] Although this result was based on language found in § 4 of the United States Arbitration Act of 1925, the Court noted that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 1806 n. 12, 18 L.Ed.2d 1270 (1967). Thus, according to the Court, to make enforceability of arbitration clauses consistent with other contracts, arbitration could be suspended if fraud were specifically alleged to have induced the making of the arbitration agreement. *Id.*

[2] This reasoning is not inconsistent with the strong federal policy favoring arbitration. *See Perry v. Thomas*, —— U.S. ——, 107 S.Ct. 2520, 2525, 96 L.Ed.2d 426 (1987); *Peterson v. Shearson/American Express*, 849 F.2d 464, 465-66 (10th Cir. 1988) ("[w]hen a contract mandates arbitration, courts generally will enforce the arbitration clause absent a waiver"). Given that arbitration involves less procedural protection than a full judicial proceeding, the policy favoring enforcement of contract arbitration clauses strengthens our analogy.

III.

We now address evidentinary issues raised on appeal and cross-appeal. First, Hutton argues that the trial judge erred by failing to admit a financial statement for the purpose of showing the existence of a joint venture between Telum and Pinder.

Hutton offered a financial statement containing an account receivable referring to the "Telum joint venture." Rec. vol. IX at 895-96. Pinder testified that the receivable reflected an amount owed to J.P. Exploration Co. by himself or a related company for construction of the rig. *Id.* at 896. Counsel for Telum objected on the grounds of materiality, asserting that the statement showed a debt owed by Pinder and not by Telum. The trial judge sustained the objection. *Id.*

Materiality of an item of evidence refers to whether or not that evidence relates to a fact of consequence to the determination of an action. 1. J. Weinstein and M. Berger, Weinstein's Evidence § 401[3] (1986). Although the objection was made and sustained on the basis of materiality, the concept of materiality is now embodied within the broader notion of relevance as defined in the federal rules: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact *that is of consequence to determination of the action* more probable or less probable than it would be without the evidence." Fed.R. Evid. 401 (emphasis added). A trial court has broad discretion to determine whether evidence is relevant, and its decision will not be reversed on appeal absent a showing of clear abuse of that discretion. *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 825 (10th Cir.1986).

Substantive law, in this case Utah law, determines which facts are of consequence in a given action. 1 J. Weinstein and M. Berger, Weinstein's Evidence § 401[3] (1986). Under Utah law, the knowledge of a joint

venturer with regard to the subject of the venture is imputed to the other joint venturers. Utah Code Ann. § 48-1-9 (1981) (knowledge of partner charged to partnership); *Hammer v. Gibbons & Reed Co.*, 29 Utah 2d 415, 510 P.2d 1104, 1105 (1973) (joint ventures bear partnership relation to each other). If, as joint venturers, Pinder's knowledge that the rig was not complete at the time of closing could be attributed to Telum, then the joint venture issue would clearly relate to whether Telum in fact relied upon Welling's misrepresentations. As the evidence in question referred specifically to the alleged joint venture, we hold that the trial court abused its discretion in refusing to admit the financial statement.

IV.

On cross-appeal, Telum argues that the trial court erred in refusing to permit Telum to introduce evidence showing that Welling, as Hutton's agent, embezzled $40,000 in connection with the Telum lease. Upon Hutton's objection, the trial judge excluded the evidence as both irrelevant and inflammatory. Rec. vol. X at 1075.

Telum argues that the proffered testimony was relevant 1) to impeach Welling, 2) to show Welling's intent and motive in making misrepresentations to Telum and 3) to show that Telum should not be responsible for the $40,000 which was included as part of the equipment cost owed on the lease to Hutton.

The trial court's decision to exclude evidence as irrelevant is within its sound discretion and will not be reversed absent an abuse of discretion. *Hill*, 790 F.2d at 825. First, Telum fails to show why Welling's purported embezzlement from Hutton would affect the amount that Telum owes Hutton under the lease, assuming the lease were held valid. Further, during pretrial discussions, counsel for Telum acknowledged that there was no dispute as to what payments were agreed to under the lease and which of those payments were made.

Rec. vol. V at 31. Thus, the trial judge did not abuse his discretion by considering the alleged embezzlement irrelevant when offered to mitigate Telum's obligation to Hutton.

Evidence of the alleged embezzlement had some relevance to Welling's motive in making the misrepresentations charged by Telum, and for impeachment.[3] Even if relevant, however, the trial judge may properly exclude evidence "if its probative value is substantially outweighed by the danger of prejudice." Fed.R.Evid. 403; *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1395 (10th Cir.1987). A determination to exclude evidence under this rule is similarly within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *Id.* at 1396.

In making the Rule 403 determination, the district judge must balance the relevance of the evidence with its potentially prejudicial effect. *Id.* Further, this balancing task "is one for which the trial judge, because of his familiarity with the full array of evidence in the case, is particularly suited." *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir.1977). We cannot say that the trial judge abused his discretion. In light of the inflammatory nature of the evidence regarding the alleged embezzlement, it was within the discretion of the trial judge to exclude that evidence, and we sustain his ruling.

V.

On cross-appeal, Telum argues that the trial court erred by denying Telum's request for special damages or reimbursement. As part of its restitution claim, Telum

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[3] Hutton argues that the application of Rule 608(b), regarding the admissibility of specific instances of conduct other than convictions for attacking credibility, would preclude the use of this evidence to impeach welling. Appellant's Reply Brief at 27-28. However, the terms of Rule 608(b) would not preclude *any* testimony on the subject but instead would forbid the resort to the use of extrinsic evidence. Fed.R.Evid. 608(b).

sought reimbursement for money expended in trying to repossess the rig and collect insurance proceeds after the sale to a third party of J.P. Exploration. Following a post-trial hearing on the matter, the trial court denied Telum's motion for reimbursement. Rec. vol. I at 123-24. Because the order of the trial court contains no findings of fact or conclusions of law, we decline to review it on appeal. Instead, we vacate the order denying reimbursement and remand the issue for consideration upon retrial.

VI

The district court judgment based on the jury verdict and the order denying reimbursement are VACATED, and the case is REMANDED to the district court for a new trial consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November 25, 1988

Before Honorable William J. Holloway, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges, and Honorable Luther L. Bohanon, District Judge.*

No. 86-1375
86-1496

TELUM, INC., a Nebraska corporation,
EARL K. COOK and CARL R. KING,
Plaintiffs-Appellees
and Cross-Appellants,

vs.

E. F. HUTTON CREDIT CORPORATION, a corporation,
Defendant-Appellant
and Cross-Appellee.

This matter comes on for consideration of Appellees and Cross-Appellants' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

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* Honorable Luther L. Bohanon, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. C83-0187J

TELUM, INC., a Nebraska corporation,
EARL K. COOK, and CARL R. KING,
Plaintiffs,

vs.

E. F. HUTTON CREDIT CORPORATION,
a Delaware corporation,
Defendant.

E. F. HUTTON CREDIT CORPORATION,
a Delaware corporation,
Counterclaimant,

vs.

TELUM, INC., a Nebraska corporation,
EARL K. COOK, and CARL R. KING,
Counterdefendants.

JUDGMENT (Corrected)

This action came on for trial before the Court and a jury, Honorable Bruce S. Jenkins, United States District Judge presiding, on March 4, 1985, and Reed L. Martineau, Michael R. Carlston and Rex E. Madsen of Snow, Christensen & Martineau having appeared on behalf of

plaintiffs and counterdefendants, and Francis M. Wikstrom and T. Patrick Casey of Parsons, Behle & Latimer appearing on behalf of defendant and counterclaimant.

The issues having been duly tried and the jury having duly rendered its verdict, and the Court now further finding and concluding as follows:

1. That defendant's counterclaim should be dismissed with prejudice;

2. That plaintiffs are entitled to rescission of the lease with defendant; and

3. That the plaintiffs are entitled to recover from defendant the sum of $140,639.08 with interest thereon at ten percent (10%) per annum from and after October 1, 1982 to the date of this Judgment and at the rate of 7.71% per annum from and after the date of this Judgment until paid;

IT IS HEREBY ORDERED AND ADJUDGED:

1. That defendant's counterclaim be, and it hereby is, dismissed with prejudice;

2. That the Master Lease between plaintiffs and defendant be, and it hereby is, rescinded, terminated and declared to be of no further force or effect;

3. That plaintiff Telum, Inc. have and recover from defendant the sum of $140,639.08 together with interest thereon at ten percent (10%) per annum from and after October 1, 1982 to the date of this Judgment and from and after the date hereof until paid at the rate of 7.71% per annum; and

4. That plaintiffs are awarded their costs incurred herein in an amount to be determined.

DATED this 5 day of March, 1986.

Copies mailed to counsel 3/7/86: mw
Reed L. Martineau, Esq.
F. Robert Reeder, Esq.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
United States District Judge

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing Judgment (Corrected) to the following on this 4th day of March, 1986:

Reed L. Martineau, Esq.
Michael R. Carlston, Esq.
Rex E. Madsen, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellees
10 Exchange Place, 11th Floor
P.O. Box 3000
Salt Lake City, Utah

/s/ [Illegible]